Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

INSURANCE COMPANY OF NORTH AMERICA, et al.

Petitioner,

versus

PUERTO RICO MARINE MANAGEMENT, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERT W. FENET, Esq. & JAMES A. TORO, Esq.

Woodley, Barnett, Cox
Williams, Fenet & Palmer
Counsel for Petitioner
P.O. Drawer EE
Lake Charles, LA 70602
(318) 433-6328

Chavier-Stevenson & Toro
P.O. Box 3952
Old San Juan, PR 00904
(809) 725-1004

QUESTION PRESENTED

What time limitation should apply to a cargo claim arising after a completed voyage when the First Circuit has applied COGSA and the Eleventh Circuit has applied the Harter Act in deciding this issue?

PARTIES TO THIS PROCEEDING

Insurance Company of North America
Orion
English & American
Phoenix Assurance Company
British Law Insurance Company
Alliance Insurance Company
Parcels and General Insurance Company
Road and Transport Insurance Company
Weir Insurance Company
T.I.C.
Bishopsgate Insurance Company
River Thames Insurance Company
Malvern Insurance Company
Norwich Trust Insurance
London and Hull Insurance Company
Scottish Lion Insurance Company
New Zealand (U.K.) Insurance Company
Prudential Insurance Company
Excess Insurance Company
New Hampshire Insurance Company
Sphere Insurance Company
Iron Trades Insurance Company
Sovereign Insurance Company
Puerto Rico Marine Management, Inc.

INDEX

Page

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement of the Case 2

The Facts 2

Reasons for Granting the Writ 3

Argument 4

Conclusion 6

Certificate of Service 8

Entry of Appearance 9

Appendix 10

Judgment and Opinion of the United States District Court for the District of Puerto Rico 1a

Judgment and Opinion of the United States Court of Appeals for the First Circuit 8a

46 U.S.C. § 1311 ..... 23a

46 U.S.C. § 1312 ..... 23a

46 U.S.C. § 190 ..... 23a

TABLE OF AUTHORITIES CITED

Cases:

Allstate Insurance Company v. International Shipping Corporation, 703 F.2d 497 (11th Circ. 1983). 5,6

R.L. Pritchard and Company v. SS Hellenic Laurel, 342 F.Supp. 388 (S.D.N.Y. 1972). 5,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No.

INSURANCE COMPANY OF NORTH AMERICA, et al

Petitioner,

versus

PUERTO RICO MARINE MANAGEMENT, INC.

Respondents.

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Insurance Company of North America, et al, prays that a Writ of Certiorari issue to review the Judgment and Opinion of July 26, 1985, United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinion of the United States District Court for the District of Puerto Rico (App. A, infra, pp. 1a) is reported at 599 F. Supp. 199 and the Opinion of the United States Court of Appeals for the First Circuit (App. A, infra, pp. 6a) is reported at 768 F.2d 470

JURISDICTION

The Judgment of the Court below (App. A Infra pp. 6a) was entered on July 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

What time limitation should apply to a cargo claim arising after a completed voyage when the First Circuit has applied COGSA and the Eleventh Circuit has applied the Harter Act in deciding this issue?

STATEMENT OF THE CASE

This is an action by INSURANCE COMPANY OF NORTH AMERICA, et al, (hereinafter "INA") seeking to recover monies paid to their insurer, MENDEZ AND COMPANY, INC., for the loss of 800 containers of codfish which were shipped from Elizabeth, New Jersey to San Juan, Puerto Rico and then illegally removed from the storage warehouse belonging to PUERTO RICO MARINE MANAGEMENT, INC., the carrier and the stevedore. INA referred this matter to counsel as PUERTO RICO MARINE MANAGEMENT, INC. denied liability for the theft of the goods. On December 1, 1983 suit was filed in the United States District Court for the District of Puerto Rico.

The defendants filed a motion for summary judgment on August 21, 1984 alleging that the complaint was time barred under the provisions of COGSA. Plaintiffs then filed an opposition thereto and a cross motion for summary judgment asserting their rights under the Harter Act, 46 U.S.C. § 190 et seq. The District Court of Puerto Rico, at 599 F.Supp. 199, granted the defendants' motion for summary judgment on the grounds that the action was time barred under the Carriage of Goods by Sea Act, and the United States First Circuit Court of Appeal affirmed this decision at 768 F.2d 470. The District Court and the Court of Appeal held that the provisions of COGSA could be incorporated by a statement in the bill of lading and could govern the period prior to the loading of cargo and after the delivery of the cargo by the carrier.

FACTS

Canadian Saltfish Corporation shipped a container with 800 cartons of codfish to MENDEZ AND COMPANY, INC. in San Juan, Puerto Rico. The codfish was shipped from Elizabeth, New Jersey aboard the San Juan Barge 2073 and arrived in San Juan, Puerto Rico on January 2, 1982. PUERTO RICO MARINE

MANAGEMENT, INC. took possession of the container for safe keeping and delivery to an authorized agent from MENDEZ AND COMPANY, INC.

On January 5, 1982, MENDEZ AND COMPANY, INC. were notified by the San Juan Police Department that they found the empty container which had previously held the codfish. The investigation by the San Juan Police Department and the security personnel for PUERTO RICO MARINE MANAGEMENT, INC. revealed that the container had been released to an unauthorized person purporting to work for MENDEZ AND COMPANY, INC. The signature of the truck driver on the trailer exchange receipt and inspection report was illegible. No one at PUERTO RICO MARINE MANAGEMENT, INC. asked the unknown truck driver for any form of identification and thereby breached their duty to safely store the goods for MENDEZ AND COMPANY, INC. by permitting an unknown and unidentified person to remove the container. PUERTO RICO MARINE MANAGEMENT, INC. took the position that the goods had been removed from their premises illegally and they were not liable for the damages.

INA, after a thorough investigation of the incident was completed several months later, paid their insured the sum of $57,253.80 for the loss of the codfish. INA was subrogated legally and contractually to the rights of MENDEZ AND COMPANY, INC. and made numerous attempts to collect this amount from PUERTO RICO MARINE MANAGEMENT, INC. However, the defendants maintained their position that the container had been removed illegally and they were not liable for the loss. Approximately one year later, INA referred this matter to counsel as they took the position that the theft of the container was due to the gross negligence of PUERTO RICO MARINE MANAGEMENT, INC. This suit, filed on December 1, 1983, was a result of the negligence and/or breach of duty or PUERTO RICO MARINE MANAGEMENT, INC.

REASONS FOR GRANTING THE WRIT

First and Eleventh Circuits have disagreed on whether to

apply COGSA or the Harter Act to a cargo claim arising after a completed voyage.

ARGUMENT

The provisions of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 et seq., apply to the goods transported between United States ports and foreign ports. It can, by contract, be applied to the carriage of goods between United States ports and its possessions if expressly incorporated into the bill of lading. See 46 U.S.C. § 1312. Such an application of COGSA incorporates all of the provisions of COGSA, including 46 U.S.C. § 1311, which states that COGSA should not be construed as superseding the Harter Act, 46 U.S.C. § 190-196, or any other applicable law, insofar as they relate to the duties, responsibilities and liabilities of the ship or carrier prior to the time the goods are loaded on or after they are discharged from the ship.

In the instant case, PUERTO RICO MARINE MANAGEMENT, INC. incorporated COGSA in the bill of lading and assert that the contract extended the provisions of COGSA to include the time the goods were in the care of its agents and/or independent contractors. The bill of lading stated that all provisions of COGSA would apply to this shipment. As such, the terms of the bill of lading are in direct conflict with each other, i.e. in trying to extend COGSA to apply to the post discharge period, yet including the COGSA provision which does not allow it to supersede the Harter Act.

The judicial intent of the Harter Act was to prevent carriers and their agents of relieving themselves from liability for their negligence prior to or after discharge of the cargo. 46 U.S.C. § 190-196.

The judicial intent of the Harter Act was to prevent carriers and their agents of relieving themselves from liability for their negligence prior to or after discharge of the cargo. 46 U.S.C. § 190-196.

The differences between COGSA and the Harter Act are

easily distinguished as set out in the table below.

COGSA (46 U.S.C. § 1300 et seq)	HARTER ACT (46 U.S.C. § 190 et seq)
Provides a one year statute of limitation within which suit can be brought.	Has no time limitation governing the period within which suit can be brought.
Applies to the time the goods are carried on the ship.	Applies to the period prior to or after discharge of the cargo.
Provides a limitation of liability for the carrier.	Does not allow any limitation of liability.

The United States Courts of Appeal have split in their interpretation of these conflicting provisions incorporated into a bill of lading. The District Court of Puerto Rico and the United States Court of Appeal for the First Circuit have allowed PUERTO RICO MARINE MANAGEMENT, INC. to expand the provisions of COGSA by applying the one year statute of limitations under COGSA to the period, before and after discharge of the cargo and thus supersede the Harter Act.

The United States Court of Appeal for the Eleventh Circuit has followed the letter of the law by not allowing COGSA to apply to the period prior to loading and after discharge of the goods. See *Allstate Insurance Company v. International Shipping Corporation*, 703 F.2d 497 (11th Cir. 1983). The Eleventh Circuit has held that they would not limit the time period within which suit could be brought, particularly where the limitations arguably conflicted with the absence of any specific limitations under the Harter Act.

The United States District Court for the Southern District of New York has also ruled that the provisions of COGSA, which are inconsistent or in conflict with the Harter Act, cannot be incorporated into a bill of lading to cover the responsibility of the carrier or its agent after discharge or before delivery of the cargo. *R.L. Pritchard and Company v. SS Helenic Laurel*, 342 F.Supp. 388 (S.D. N.Y. 1972). The New York Court also interpreted the duty of the carrier and its agents during the post discharge period to those of a bailee. As a bailee, the defendant would be liable for its negligence and would have to rebut the plaintiff's prima facie case

of negligence by showing the loss was in no way attributable to its negligence.

We believe that the Harter Act takes precedence in the case *sub judice* and the one year statute of limitations under COGSA is not applicable. The complaint has been timely filed under the Harter Act and PUERTO RICO MARINE MANAGEMENT, INC., has in no way been prejudiced. They had notice that INA held them responsible for the loss of the codfish from the time the theft had been investigated.

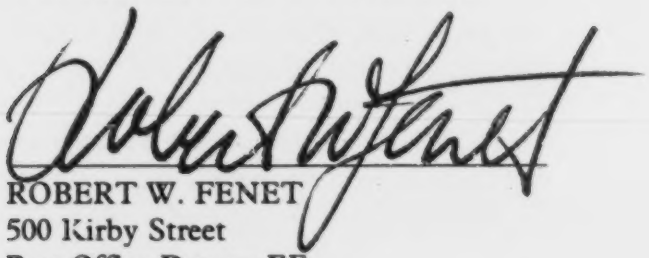
CONCLUSION

The provisions of COGSA, insofar as they attempt to supersede the Harter Act, cannot be extended to the period before or after discharge of goods from the carrier, even though the carrier had incorporated COGSA into its bill of lading. The provisions of COGSA should only govern the carriage of goods by sea. To extend the provisions of COGSA to include the period prior to or after discharge of the cargo is an attempt to escape and limit liability of the agents and the carrier and is in direct conflict with the provisions of the Harter Act. United States Courts have split on their interpretation of COGSA and the Harter Act in similar cases. Carriers of goods by sea should not be permitted to insert a contract clause which would expand the parameters of a United States statute, such as COGSA, and attempt to supersede a priority statute such as the Harter Act.

We respectfully submit that the interpretation of the provisions of COGSA and the Harter Act in *R.L. Pritchard, supra,* and *Allstate v. International Shipping, supra,* are the correct interpretation of the legislative intent of the law. The Harter Act is the priority statute, as acknowledged in COGSA (46 U.S.C. § 1311) and should consistently be held to apply to the period before loading and after discharge of the cargo. Since this case is one arising after discharge of the cargo, the Harter Act statute of limitations should prevail and INA should be permitted to proceed

with its cause of action against the defendants.

Respectfully submitted,
WOODLEY, BARNETT, COX,
WILLIAMS, FENET & PALMER



ROBERT W. FENET
500 Kirby Street
Post Office Drawer EE
Lake Charles, LA 70602
(318) 436-6328

AND

JAMES A. TORO
CHAVIER-STEVENSON AND TORO
Post Office Box 3952
Old San Juan, Puerto Rico 00904
(809) 725-1004
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above and foregoing Petition for Writ of Certiorari have this day been served upon all counsel of record by placing same in the U.S. Mail, postage prepaid and properly addressed:

J. Ramón Rivera-Morales
Jimenez & Fuste
G.P.O. Box 6104
San Juan, Puerto Rico 00936

LAKE CHARLES, LOUISIANA this 24 day of Oct 1985.

ROBERT W. FENET

ENTRY OF APPEARANCE

To the Clerk of the United States Supreme Court:

In accordance with Rule 33 of this Honorable Court, please enter my appearance in this action as attorney for Petitioner, Insurance Company of North America, et al

Dated October 24, 1985

ROBERT W. FENET
Woodley, Barnett, Cox,
Williams, Fenet & Palmer
P.O. Drawer EE
Lake Charles, LA 70602

Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

INSURANCE COMPANY OF
NORTH AMERICA, et, al,

Plaintiffs

v. CIVIL NO. 83-2920(PG)

PUERTO RICO MARINE
MANAGEMENT, INC.,

Defendants

OPINION AND ORDER

This action was brought by Insurance Company of North America, (hereinafter referred to as INA) as representative and on behalf of various insurance companies, to recover for loss of cargo allegedly due to defendant's breach of contract and negligence.

Defendant filed a motion for summary judgment on August 21, 1984, alleging that the complaint is time barred and that plaintiff failed to state a claim upon which relief can be granted. On September 5, 1984, plaintiff filed an opposition thereto and a cross-motion for summary judgment. Subsequently, defendant filed, on October 1, 1984, an opposition to plaintiff's cross-motion for summary judgment and a reply to plaintiff's opposition to defendant's motion for summary judgment. On October 15, 1984, plaintiff filed a supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment.

Jurisdiction of this Court is based on admiralty pursuant to 28 U.S.C. § 1333.

When all the parties have moved for summary judgment and no party has raised any genuine issue of material fact this case is appropriate for disposition by summary judgment. Wright, Miller

& Kane, *Federal Practice and Procedure:* Civil 2d § 2720 (and cases therein cited at p. 25 n.14).

Based on the pleadings, their annexed exhibits and supporting affidavits, the Court makes the following findings of facts and arrives at the following conclusions of law:

Findings of Fact

1. On December 16, 1981, Canadian Saltfish Corporation shipped a container of 800 cartons of codfish from Elizabeth, New Jersey, to Mendez & Company, Inc., in San Juan, Puerto Rico.

2. A bill of lading was issued by Puerto Rico Marine Management, Inc., (hereinafter referred to as PRMMI) covering the shipment of codfish consigned to Mendez & Company, Inc. (Exhibit A to defendant's motion for summary judgment).

3. The container wherein the codfish was shipped arrived in Puerto Rico on January 2, 1982.

4. Upon the arrival of the goods in San Juan, PRMMI held the goods in storage at its facilities in San Juan for safekeeping and delivery to Mendez & Company, Inc.

5. On January 4, 1982, PRMMI delivered the container to someone purporting to be consignee, Mendez & Company, Inc.'s trucker, as evidenced by the Trailer Interchange Receipt and Inspection Report (Exhibit B to defendant's motion for summary judgment).

6. On the above date, a truck driver for Mendez & Company, Inc., arrived at the facilities of PRMMI to pick up the container and was informed that the same had been picked up by someone purporting to work for Mendez & Company, Inc.

7. PRMMI released the container to an unauthorized person whose signature on the Trailer Exchange Receipt and Inspection Report is illegible.

8. Plaintiff, INA, as insurer of Mendez & Company, Inc., paid them the sum of $57,263.80 for the loss of the codfish and brings this subrogation claim in its own name for an alleged failure to deliver the cargo held in storage for Mendez & Company, Inc.

9. The complaint was filed on December 1, 1983, but summons were not served on PRMMI until March 19, 1984.

Conclusions of Law

Defendant alleges that this action arises under the U.S.

Carriage of Goods by Sea Act, (COGSA) 46 U.S.C. § 1300, et seq., and is time barred pursuant to the provisions of the Bill of Lading which sets a one-year limit to initiate damage or loss suits commencing from the time of delivery of the goods or the date when the goods should have been delivered. Plaintiff opposes summary judgment contending that this is not an action arising under COGSA because (1) this was a shipment from a U.S. port to a U.S. port, and (2) the goods involved herein were delivered and thus were no longer "on board ship." INA further alleges that PRMMI had the duties of a bailee or a warehouseman and that if the Court should find otherwise, then the Harter Act, 46 U.S.C. § et seq., would prevail.

In its supplemental memorandum of law, plaintiff also alleges that because INA, as subrogee, was not a party to the contract between its insured and PRMMI and never received actual or constructive notice of the limitations provision, the COGSA statute of limitations incorporated in the short bill of lading did not apply to INA.

It is clear that the Carriage of Goods by Sea Act, (COGSA) 46 U.S.C. § 1300, et seq., does not apply *ex proprio vigore* to goods in shipment between ports of the United States, 46 U.S.C. § 1312. It is also clear that COGSA does not apply *ex propio vigore* to the period before the goods are placed on board ship ("tackle to tackle") or to the period after their discharge, 46 U.S.C. § 1301 (e). *Firestone Tire & Rubber v. Almacenes Miramar, Inc.*, 452 F.Supp. 670 (D.C.P.R. 1978) *affirmed*, 588 F.2d 817 (1st Cir. 1978). The Harter Act applies to goods in the custody of the carrier before delivery and after discharge, 46 U.S.C. § 190, et seq. However, the parties agreed that the provisions of COGSA should be incorporated into their contract, and it has been repeatedly held that COGSA can be incorporated so as to apply in situations where it otherwise would not if so expressly stated in the "bill of lading or similar document of title which is evidence of a contract for carriage of goods by sea . . . 46 U.S.C. § 1312. *See, Empacadora Puertorriguena de Carnes v. Alterman Tr. Line*, 303 F.Supp. 474 (D.C.P.R. 1969); *Fireman's Insurance Company of Newark v. Gulf Puerto Rico Lines, Inc.*, 349 F.Supp. 952 (D.C.P.R. 1973); *Commonwealth of Puerto Rico v. Sea-Land Service, Inc.*, 349 F.Supp. 964 (D.C.P.R. 1973); *Santiago v. Sea-Land Service, Inc.*,

366 F.Supp. 1309 (D.C.P.R. 1973); *North River, Ins. Co. v. FED SEA/FED Pac Line,* 647 F.2d 985 (9th Cir. 1981); *Firestone Tire & Rubber v. Almacenes Miramar, Inc., supra; Home Ins. v. Puerto Rico Maritime Shipping Auth.,* 524 F.Supp. 541 (D.C.P.R. 1981).

The contract governing the transaction at issue is a short-form bill of lading (short bill). The short bill incorporates two documents: one is the long-form bill of lading (long bill) on file with the Federal Maritime Commission, the other is the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300, et. seq.

The shortbill contains a clause which reads as follows:

> 2. During all other periods, including this time the goods are in the custody of Puerto Rico Maritime Shipping Authority and during the time the goods are loaded on board, carried or discharged from any vessel, and during the time the goods are in the custody of Puerto Rico Maritime Shipping Authority at the port of discharge, and during the time the goods are oncarried or transported or in the custody of Puerto Rico Maritime Shipping Authority, its agents or any independent contractors after discharge and until delivery, this carriage shall be subject to the terms and conditions of the Puerto Rico Martime Shipping Authority's regular long form bill of lading contract. All parties to this contract are bound by the terms, provisions, stipulations and conditions of Puerto Rico Maritime Shipping Authority's regular long form bill of lading and published tariff which is on file with the Federal Maritime Commission, posted on board each vessel and open for shippers' or other parties' inspection at the company's offices, and the same are hereby incorporated with the same force and effect for all purposes as if it were severally, fully and specifically set forth herein. Where applicable, this bill of lading is subject to Public Law 85-810, Stat. 977, approved August 28, 1958. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 26, 1936.

(Defendant's Exhibit C to motion for summary judgment)

The short bill is subject to the Regular Long Form of Bill of Lading which contains the following statement regarding when the contract shall have effect:

> 1. COVERAGE. This Bill of Lading shall have effect while the containers, goods and packages are in the custody of the vessel or Puerto Rico Maritime Shipping Authority, its agents, its servants and its independent contractors. At all other times containers, goods and packages shall be governed by the terms and conditions of the connecting carrier's Bill of Lading (if any) and/or Uniform I.C.C. Bill of Lading. When this Bill of Lading governs, it is subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which are incorporated herein, and nothing herein contained is a surrender by the carrier of any of its rights, immunities or limitations or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further.

(Exhibit C accompanying defendant's motion for summary judgment)

The language contained in these provisions is what makes COGSA a part of the domestic contract of carriage as evidenced by the bill of lading. The parties agreed in said clauses to apply the terms of the Act throughout the entire period when the shipper-carrier relationship existed and not merely from tackle to tackle. In *Firestone Tire & Rubber Co. v. Almacenes Miramar, Inc., supra,* a case directly on point, a bailee-warehouseman argument similar to the one raised by INA under a similar PRMSA Bill of Lading was specifically rejected. The case of *Allstate Ins. Co. v. International Shipping Corp.* 703 F.2d 497 (11th Cir. 183) cited and quoted by plaintiff in its supplemental memorandum is clearly distinguishable from the case at bar. Therein, the short bill of lading incorporated all of COGSA and the long form bill of lading on file with the Federal Maritime Commission. However, it does not appear from the case that the parties agreed in their bills of lading to apply

COGSA to the period before the goods were placed on board the ship. Because the damage occurred prior to the time the goods were loaded, the Court therein applied the Harter Act. Contrariwise, the parties in the instant case specifically agreed in the short form bill of lading that the long form bill of lading should apply to the period after the goods are discharged from the ship into the custody of the carrier, and the long form bill of lading specifically provides that COGSA is applicable to the period when the goods are in the custody of the carrier.

There is a special clause included in the long bill of lading which specifically provides that suit has to be brought within one year of delivery or the date when the goods would have been delivered, and that suit was not deemed brought until the carrier has been served with process.[1]

It is defendant's contention that according to this provision the present suit is time barred for process was not served upon it until almost more than two years after the date when the goods should have been delivered. Plaintiff argues that since INA was not a party to the contract between its insured, Mendez & Co., Inc., and PRMMI that it never received actual or constructive notice of the limitations provision. Thus, it concludes that COGSA's statute of limitations is not applicable.

Whatever period of limitations is applicable to the insured passes by subrogation to the insurance carrier, who by reason of such subrogation, is put in place of the party to whose right it is subrogated. Couch on Insurance 2d (Rev'd) § 75.38 p. 43. The one-year statute of limitations established in the bill of lading applies to a suit by a consignee against a carrier.[2] *Puerto Rico Marine Mgmt. v. Ken Penn Amusement,* 574 F Supp. 568 (W.D.Pa.

---

[1] Clause number 923 of the Long Form Bill of Lading specifically provides: In any event, the carrier and the ship shall be discharged from all liability for any loss of, or damage to, or delay of the goods or with respect to freight, charges or expenses, or the refund thereof or any other claim of whatsoever description, unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought against the carrier or ship until jurisdiction shall have been obtained of the carrier or the ship, or both, or if brought in admiralty, unless process or written notice of the filing of a libel shall have been served or delivered to the carrier.

[2] Section 1303(6) requires that suits under COGSA be "brought within one year after delivery of the goods or the date when the goods should have been

1983) relied upon by plaintiff, is distinguishable. There, the court did not apply the COGSA statute of limitations to a counterclaim filed by a consignee against the carrier because the consignee was not a party to the freight contract executed by PRMMI and National Expositions, Inc., on behalf of the consignee. In the instant case, there is no allegation that plaintiff's insured, Mendez & Co., Inc., was not a party to the contract of carriage.

Plaintiff, INA, as insurer who paid the claims of its insured and owner of the goods, could file this subrogation claim against the ocean carrier if brought within one year after delivery of said goods or the date when the goods should have been delivered. *Home Ins. v. Puerto Rico Maritime Shipping Auth., supra.* The suit is not deemed brought until the carrier has been served with process (see cases cited in footnote 2). Service was not obtained until March 19, 1984, more than one year after the date when the goods should have been delivered. Therefore, plaintiff's claim against PRMMI is time barred.

In view of the above, it is hereby ORDERED that defendant's motion for summary judgment be and is hereby GRANTED: and IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment be and is hereby DENIED.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, December 6, 1984.

JUAN M. PEREZ-GIMENEZ
Chief U. S. District Judge

---

delivered." 46 U.S.C. § 1303(6). Within the meaning of the statute, suit has been brought as of the time the complaint was filed even though process was not served until sometime later. 2A Benedict on Admiralty, § 163 at 16-8. However, when COGSA has been incorporated with respect to time periods outside the statutory frame the parties have been allowed to define bringing an action as obtaining jurisdiction over the defendant. *Empacadora Puertorriquna de Carnes, Inc. v. Alterman Transport Line, Inc.*, 303 F.Supp. 474, 479 n. 10 (D.P.R. 1969); *Atlantic Companies v. Gulf Puerto Rico Lines, Inc.*, 355 F.Supp. 172 (D.P.R. 1972; *Medina v. South Atlantic & Caribbean Line, Inc.*, 342 F.Supp. 498 (D.P.R. 1972).

United States Court of Appeals
For the First Circuit

No. 85-1072

INSURANCE COMPANY OF
NORTH AMERICA, ET AL.,

Plaintiffs, Appellants

v.

PUERTO RICO MARINE MANAGEMENT, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Hon. Juan M. Perez-Gimenez, *U.S. District Judge*)

Before

Campbell, Chief Judge,

Van Dusen*, *Senior Circuit Judge,*

and Bownes, *Circuit Judge.*

Robert W. Fenet with whom *Woodley, Barnett, Cox, Williams, Fenet & Palmer, James A. Toro* and *Chavier-Stevenson & Toro* were on brief for appellants.

J. Ramon Rivera-Morales with whom *Jimenez & Fuste* was on brief for appellee.

July 26, 1985

*Of the Third Circuit, sitting by designation.

VAN DUSEN, *Senior Circuit Judge*. Plaintiff, Insurance Company of North America (INA),[1] which insured a consignee against the loss of a certain shipment of goods, brought suit against defendant, Puerto Rico Marine Management, Inc. (PRMMI), the sea carrier of those goods. Plaintiff alleged that defendant acted negligently be delivering the goods to an imposter who claimed to represent the consignee, rather than delivering them to the actual consignee. The defendant moved for summary judgment, contending that plaintiff's suit was time-barred by a one-year limitations provision contained in the bill of lading covering this shipment. Plaintiff opposed the motion, arguing that a one-year limitations period did not govern the action. The district court granted defendant's motion for summary judgment, concluding that plaintiff's suit was time-barred.

Plaintiff now appeals the judgment of the district court. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We will affirm for the reasons stated in this opinion.

I. Factual History [2]

In December 1981, the Canadian Saltfish Corporation entered into a shipping agreement with defendant-carrier, PRMMI, to ship a load of 800 cartons of dry salt codfish to the consignee, Mendez & Company, Inc. PRMMI accepted the cargo for shipment at Elizabeth, New Jersey. The agreement provided that the cargo would be shipped to San Juan, Puerto Rico, where it was to be picked up by the consignee. A bill of lading covering the shipment was issued by PRMMI.

The cargo arrived at the port of San Juan on January 2, 1982.

---

[1] Plaintiff, the Insurance Company of North America, is suing as a representative of, and on behalf of, thirty-two insurance companies subscribing to Lloyds' policy of marine insurance.

[2] The facts recited herein are based on the district court's purported "Findings of Fact." *See Ins. Co. of North Am. v. Puerto Rico Marine Mgmt.*, 599 F.Supp. 199, 201 (D.P.R. 1984). The court's characterization of the facts of the case as "findings of fact" implies that the court resolved disputed factual issues pursuant to Fed. R. Civ. P. 52. Yet, the district court granted defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56, which is proper only if there is no genuine issue as to any material fact. Because the parties did not dispute any material facts in this case, we will treat the court's "Findings of Fact" as merely a statement of undisputed facts, which is not subject to review by this court.

Upon the arrival of the goods, PRMMI unloaded the goods from its ship and held them in its storage facilites for safekeeping. On January 4, 1982, PRMMI delivered the goods to someone who arrived at its facilities purporting to represent the consignee. Later that day, an actual representative of the consignee came to PRMMI's storage facilities to obtain the goods, at which time he was informed by PRMMI officials that the goods had been delivered to another person. The next day, January 5, 1982, PRMMI was informed by the police department that the trailer that had contained the goods in question had been found empty and abandoned.

At the request of PRMMI, the police department then notified the consignee of its discovery. The consignee maintained that it had never taken delivery of the lost goods and asked PRMMI for reimbursement for their loss. PRMMI refused, asserting that it had delivered the goods to a person presenting the proper documents necessary to obtain them. As a result, the consignee filed a claim for compensation for the lost goods with plaintiff, its insurer. Plaintiff paid the claim.

On December 1, 1983, plaintiff filed this subrogation action in its own name against PRMMI in the United States District Court for the District of Puerto Rico. Service of process was not effected on PRMMI until March 19, 1984. The complaint made two claims: (1) that PRMMI had breached a maritime contract to protect the consignee's goods, and (2) that PRMMI was negligent in its care of those goods.

On August 21, 1984, PRMMI filed a motion for summary judgment. PRMMI contended that plaintiff's action failed to state a claim because it was not instituted within one year of the date the claim arose, as was required under the limitations provisions contained in the bill of lading which governed the shipment. On December 6, 1984, the district court granted PRMMI's summary judgment motion, agreeing that the action was time barred. *See Ins. Co. of North Am. v. Puerto Rico Marine Mgmt.*, 599 F. Supp. 199, 204 (D.P.R. 1984). Plaintiff now appeals the judgment of the district court.

II. Discussion

In granting defendant's motion for summary judgment, the district court ruled that plaintiff's action was time-barred because

it was filed more than one year after the date delivery of the goods to the consignee was due. The district court concluded that the action was governed by the one-year limitations period specified in defendant's long-form bill of lading, which had been placed on public file with the Federal Maritime Commission (FMC). The court reasoned that, because the short-form bill of lading—which defendant issued for this specific shipment—expressly incorporated the terms of the long-form bill of lading, the limitations provision contained in the long-form bill of lading controlled. Plaintiff contends that the district court erred because, as a matter of law, insurers of consignees are not bound by limitations provisions contained in long-form bills of lading filed with the FMC, absent actual notice of such provisions.

We first observe that, because this case is a subrogation action, plaintiff, an insurer, has no greater or lesser rights than those of its insured, the consignee (Mendez & Co.). *See United States v. Munsey Trust co.*, 332 U.S. 234, 242 (1947); *First National City Bank v. United States*, 548 F.2d 928, 936 (Ct. Cl. 1977); *Aaacon Auto Transport v. State Farm Mut. Auto Ins.*, 537 F.2d 648, 651-52 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Thus, in deciding what limitations provision applies to plaintiff in this action, we must determine what limitations period would have governed a suit against defendant brought by the consignee in its own right.

Generally, for shipments between ports of the United States and its possessions, there is no specific limitations period for suits by a consignee against a carrier. The Harter Act, 46 U.S.C. §§ 190-196 (1982), which governs such shipments, merely prohibits a carrier from releasing itself completely from liability for its negligence. *See* 46 U.S.C. § U.S.C. 190 (1982). Carriers may, however, impose a limitations period on all claims against them for negligence, without violating the Act, so long as the time period specified is reasonable. *See The Queen of the Pacific*, 180 U.S. 49, 53-58, (1901); *J. Aron & Co. v. Askvin*, 267 F.2d 276, 278 (2d Cir. 1959); *Zifferer v. Atlantic Lines, Ltd.*, 278 F. Supp. 736, 739 (D.P.R. 1968).

On the other hand, for shipments between the United States and foreign ports, the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, specifically provides a one-year limitations period for claims against a carrier for negligence. The Act states:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

46 U.S.C. § 1303(6) (1982). COGSA does not apply by its own terms to shipments, such as one in this case, which transfer goods between ports of the United States and its possessions. 46 U.S.C. § 1312 (1982). Nevertheless, COGSA can apply if the bill of lading covering such shipments contains an express statement that the provisions of COGSA govern.[3]

In this case, plaintiff maintains that its claim is governed by the Harter Act, and therefore it was not required to file suit within any particular time period. Plaintiff asserts that, as long as its suit was filed within a reasonable time, the suit was not time-barred. By contrast, defendant claims that the bill of lading covering the shipment in question specifically stated that the provisions of COGSA—including COGSA's one-year limitations provision—govern this shipment.

The bill of lading for the shipment in this case actually consists of two parts: a short-form bill of lading and a long-form bill of lading. The short-form bill of lading is a document issued by defendant that lists the particular specifications of the cargo (contents, weight, etc.) in the shipment. The long-form bill of lading is a document issued by defendant which lists the rates,

---

[3]Section 1312 provides in relevant part:

> "This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term 'United States' includes its district, territories, and possessions. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, any other port of the United States or its possession: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: . . . "

46 U.S.C. § 1312 (1982).

fares, and charges, as well as terms and conditions pertaining to all of defendant's shipments. The long-form bill of lading is placed on public file with the Federal Maritime Commission pursuant to 46 U.S.C. § 844.[4] Section 844 provides that a carrier, such as defendant, may give notice of the terms and conditions contained in a long-form bill of lading to all parties in interest—and thereby bind them to these terms and conditions—by incorporating by reference these terms and conditions into a short-form bill of lading.[5]

The defendant's short-form bill of lading for this shipment incorporated by reference all the terms and conditions of its long-form bill of lading. The short-form bill of lading specifically stated

---

[4]Section 844 states:

"§844. Schedule of rates; filing; posting; availability; incorporation by reference in short form documents; penalties for violations

"Every common carrier by water in intercoastal commerce shall file with the Federal Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed, and kept open to public inspection as aforesaid by any such carrier . . . shall include the terms and conditions of any passenger ticket, bill of lading, contract of affreightment, or other document evidencing the transportation agreement."

46 U.S.C. § 844 (1982).

[5]The requirements of such incorporation by reference are as follows:

"Such terms and conditions, if filed as permitted by this section and framed under glass and posted in a conspicuous place on board each vessel where they may be seen by passengers and others at all times, may be incorporated by reference in a short form of same actually issued for the transportation, or in a dock receipt or other document issued in connection therewith, by notice printed on the back of each document that all parties to the contract are bound by the terms and conditions as filed with the Federal Maritime Commission and posted on board each vessel, and when so incorporated by reference every carrier and any other person having any interest or duty in respect of such transportation shall be deemed to have such notice thereof as if all such terms and conditions had been set forth in the short form document."

46 U.S.C. § 844 (1982).

that the long-form bill of lading governed at all times during which the goods were in the custody of the defendant or its agents.[6]

The claim at issue in this case arose after the goods were unloaded from defendant's ship at the San Juan port, but while the goods were still in defendant's custody. Thus, defendant argues that the limitations provisions in the long-form bill of lading govern this section.

The long-form bill of lading provides for a one-year limitations period in two different places. Item number 1 of the Terms and Conditions section states that the long-form bill of lading is in effect while goods being shipped are in defendant's custody and that, when it is in effect, it is subject to the provisions of COGSA.[7] In essence, this item provides that COGSA's one-year limitations period applies at any time in which defendant has custody of the goods. Although COGSA does not apply by its own

---

The defendants in this case satisfied section 944's requirements of incorporation. Paragraph 2 of the section in defendant's short-form bill of lading entitled "Contract and Terms and Conditions" stated explicity:

> "All parties to this contract are bound by the terms, provisions, stipulations and conditions of Puerto Rico Maritime Shipping Authority's regular long form bill of lading and published tariff which is on file with the Federal Maritime Commission, posted on board each vessel and open for shippers' or other parties' inspection at the company's offices, and the same are hereby incorporated with the same force and effect for all purposes as if it were severally, fully and specifically set forth herein . . . "

[6]The short-form bill of lading provided:

> "2. During all other periods, including the time the goods are in the custody of Puerto Rico Maritime Shipping Authority and during the time the goods are loaded on board, carried or discharged from any vessel, and during the time the goods are in the custody of Puerto Rico Maritime Shipping Authority at the port of discharge, and during the time the goods are oncarried or transported or in the custody of Puerto Rico Maritime Shipping Authority, its agents or any independent contractors after discharge and until delivery, this carriage shall be subject to the terms and conditions of the Puerto Rico Maritime Shipping Authority's regular long form bill of lading contract . . . "

[7]Defendant's long-form bill of lading provides:

> "TERMS AND CONDITIONS OF
> REGULAR LONG FORM OF BILL OF LADING
>
> "1. COVERAGE. This Bill of Lading shall have effect while

terms during the time in which a carrier has custody of goods after the goods have been unloaded from the ship,[8] the Act provides that the parties to a shipping contract may agree to extend the Act's coverage to the period before loading or after unloading of the goods. 46 U.S.C. § 1307 (1982); *see Miller Export Corp. v. Hellenic Lines,* 534 F. Supp. 707, 710 (D.C.N.Y. 1982); *Mediterranean Marine Lines v. John T. Clark & Sons,* 485 F. Supp. 1330, 1337 (D.Md. 1980); *Zifferer v. Atlantic Lines Ltd.,* 278 F. Supp. 736, 739 (D.P.R. 1968).

In addition to its paragraph which states that the provisions of COGSA govern while defendant has custody of the goods, the long-form bill of lading contains a paragraph that specifically provides for a one-year limitations period for all claims against the carrier for loss of goods. Item number 23 of the Terms and Conditions section provides in part:

"In any event, the carrier and the ship shall be

---

the containers, goods and packages are in the custody of the vessel or Puerto Rico Maritime Shipping Authority, its agents, its servants and its independent contractors . . . When this Bill of Lading governs, it is subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which are incorporated herein, and nothing herein contained is a surrender by the carrier of any of its rights, immunities or limitations or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further.

"The carrier shall be entitled to avail itself of all rights, limitations, exemptions and immunities provided for in said Carriage of Goods by Sea Act, although the contract of carriage evidenced by this Bill of Lading may be for the carriage of goods between ports of the United States."

[8] Section 1311 of COGSA provides:

"§ 1311. Liabilities before loading and after discharge; effect on other laws

"Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 or this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

46 U.S.C. § 1311 (1982). The phrase "sections 190 to 196 of this title" refers to the Harter Act, 46 U.S.C. §§ 190-196 (1982).

> discharged from all liability for any loss of, or damage to, or delay of the goods or with respect to freight, charges or expenses, or the refund thereof or any other claim of whatsoever description, unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought against the carrier or ship until jurisdiction shall have been obtained of the carrier or the ship, or both, or if brought in admiralty, unless process or written notice of the filing of a libel shall have been served or delivered to the carrier."

Thus, the long-form bill of lading clearly provides for a one-year limitations period to apply to a claim, such as the one in this case, in which the goods were lost after they were unloaded from the carrier's ship but while they were still in the carrier's possession. The only question for this court to decide is whether the consignee, and correspondingly its insurer, is bound by the limitations provisions contained in the long-form bill of lading. Plaintiff maintains that it is not bound by any provisions of defendant's long-form bill of lading—except those relating to rates, fares, and charges—because it did not have actual notice of those provisions. We disagree.

The language and legislative history of the Shipping Act of 1916, the Intercoastal Shipping Act of 1933, and its 1958 amendments[9] indicate that Congress intended that consignees could be bound by the terms and conditions of carriage which are included in schedules that a carrier places on file with the Federal Maritime Commission pursuant to 46 U.S.C. § 844. The language of section 844 that was added to the Intercoastal Shipping Act of 1933 by amendment in 1958 states clearly that terms and conditions of a contract for carriage of goods, rather than just rates,

---

[9]The Shipping Act, 1916, Pub. L. No. 64-260, 39 Stat. 728 (1916), required carriers involved in intercoastal commerce to file with the United States Shipping Board (now the Federal Maritime Commission) all rates, fees, and charges in connection with transportation.

The Intercoastal Shipping Act, 1933, Pub. L. No. 72-415, 47 Stat. 1425 (1933), amended the Shipping Act of 1916 by requiring a carrier to file a fixed-rate schedule. Rates under the amendment were not permitted to be changed unless a new schedule was filed at least thirty days prior to the change.

fares, and charges, can be incorporated by reference into a short-form bill of lading and bind all parties in interest:

> "Such terms and conditions, if filed as permitted by this section . . . , may be incorporated by reference in a short form of same actually issued for the transportation, or in a dock receipt or other document issued in connection therewith, by notice printed on the back of each document that all parties to the contract are bound by the terms and conditions as filed with the Federal Maritime Commission and posted on board each vessel, and when so incorporated by reference every carrier and any other person having any interest or duty in respect of such transportation shall be deemed to have such notice thereof as if all such terms and conditions had been set forth in the short form document."

46 U.S.C. § 844 (1982).

The legislative history of the 1958 amendments indicates that the purpose of including the terms and conditions of carriage within long-form bills of lading filed with the FMC was to alleviate a carrier's burden of reproducing the lengthy list of terms and conditons on every bill of lading it issued for its shipments. By placing notice on the short-form bill of lading issued for each shipment that all parties are bound by the terms and conditions listed on the long-form bill of lading, the carrier would be in the same legal position vis-a-vis other parties in interest, including consignees, as if it had listed these terms and conditions in each short-form bill of lading.[10]

The intended purpose of the amendment was to prevent secret rebates and price cutting schemes to favored shippers.

The Intercoastal Shipping Act, 1958, Pub. L. No. 85-810, 72 Stat. 977 (1958), amended the Intercoastal Shipping Act of 1933 by allowing a carrier to issue a short-form bill of lading that could incorporate by reference a long-form bill of lading on file with the Federal Maritime Board (now the Federal Maritime Commission). *See* 46 U.S.C. § 844 (1982).

[10]The Senate Report described the need for the 1958 amendments in the following manner:

> "This bill would offer relief to ocean common carriers in the noncontiguous trades (Hawaii, Alaska, and Puerto Rico) from the necessity of including on the reverse side of bills of lading, passenger tickets, dock receipts, and other transportation documents the

Further support for the proposition that consignees are bound by all the incorporated terms and conditions contained within a long-form bill of lading filed with the FMC pursuant to section 844 is found by reviewing a similar practice for carriers governed by the Interstate Commerce Commission. Under the Interstate Commerce Act, consignees are bound by the terms and conditions, including limitations provisions, that are contained in bills of lading on file with the Interstate Commerce Commission and are incorporated by reference into short-form bills of lading.[11] The legislative history of the original Shipping Act of 1916 indicates that this Act was to be adminstered and interpreted in the same manner as was the Interstate Commerce Act. *See* H.R. Rep. No. 659, 64th Cong., 1st Sess. 32 (1916); S. Rep. No. 689, 64th Cong., 1st Sess. 12 (1916). Subsequent judicial decisions have confirmed this proposition. As the Supreme Court has stated:

> " . . . we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the

---

specific terms under which passengers or cargoes are carried. Inclusion of all of such terms and conditions makes the transportation documents cumbersome, lengthy, and costly, and creates problems in storage and processing them for issuance.

> "If adopted, all ocean carriers subject to the Intercoastal Shipping Act, 1933, could eliminate the presently archaic system of printing the entire bill of lading contract and passenger contract in the transportation document. In lieu of the long form, the carrier could issue less costly short forms which could be reproduced through modern mechanical techniques. When carriers issued such short form transportation documents, they would have legal protection equal to that obtainable under the present system. Moreover, the rights and obligations of shippers, consignees, passengers, and others having any interest or duty in the transportation furnished by such carriers would not be altered."

S. Rep. No. 2144, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. Code Cong. & Ad. News 4091.

[11] *See Southern Ry. v. Prescott*, 240 U.S. 632 (1916) (consignee bound by incorporated terms of a bill of lading concerning property not removed within a

terms of the act relating thereto, requiring a different conclusion."

U.S. Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 481 (1932) (quoted in *Inter-Island Co. v. Hawaii*, 305 U.S. 306, 312 n.9 (1938), and quoted in part in *Maritime Service v. Sweet Brokerage De Puerto Rico*, 537 F.2d 560, 562 (1st Cir. 1976).

The legislative history of the 1958 amendments does not indicate that schedules of terms and conditions filed with the FMC pursuant to section 844 should have a legal effect different than that of similar schedules filed with the Interstate Commerce Commission. Thus, it is likely Congress intended that schedules filed pursuant to section 844 and incorporated by reference into short-form bills of lading would give constructive notice to, and therefore bind, consignees.

In support of its contention that it should not be bound by terms and conditions in defendant's long-form bill of lading absent actual notice, plaintiff relies principally on two judicial decisions: *Allstate Ins. Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983), and *Puerto Rico Marine Mgmt. v. Ken Penn Amusement*, 574 F. Supp. 568 (W.D.Pa. 1983). We find both to be unpersuasive in resolving the issue presented in this case.

The facts in *Allstate* were similar to those in this case. The plaintiff, Allstate Insurance Corp., an insurer of a shipper of goods, sued the carrier to recover the damage done to the goods while they were in the carrier's custody. The suit was filed more than one year after the cause of action arose. The carrier asserted that the suit was barred by a one-year limitations provision that was included in its long-form bill of lading, the provisions of which had been properly incorporated by reference into the short-form bill of lading covering the shipment. Nevertheless, the district

---

specified period of time after notice or arrival is given); *Sankyo Seiki (America) v. S.S. Korean Leader*, 556 F. Supp. 337 (S.D.N.Y. 1982) (non-party bound by a limitations provision that was incorporated by reference into a short-form bill of lading); *American Chicle Div., Warner Lambert v. M/V Mayaguez*, 540 F. Supp. 166 (S.D. Tex. 1981) (indemnity suit by initial carrier against connecting carrier was barred by limitations provision that was incorporated by reference into initial carrier's bill of lading); *Syndor and Hundley v. Wilson Trucking Corp.*, 213 Va. 704, 194 S.E.2d 733 (1973) (consignee bound by a limitations provision included in a long-form bill of lading on file with the ICC and incorporated by reference into the short-form bill of lading).

court awarded judgment to Allstate. The United States Court of Appeals for the Eleventh Circuit affirmed, reasoning that limitations provisions in long-form bills of lading filed with the FMC by a carrier do not bind shippers or their insurance absent actual notice of the provisions. 703 F.2d at 500. The court in *Allstate* based its decision primarily on *Marvirazon Compania, Etc. v. H. J. Baker & Bros.*, 674 F.2d 364 (5th Cir. 1982). *Marvirazon*, however, was a decision interpreting the legal effect of provisions in a stevedore's tariff filed with the FMC pursuant to 46 U.S.C. § 814,[12] whereas the filed document in question in *Allstate*—as well as the one in this case—is a carrier's bill of lading filed with the FMC pursuant to 46 U.S.C. § 844. Section 844, unlike section 814, requires all terms and conditions relating to a carrier's contract for carriage to be filed with the FMC. Section 844 explicitly permits a carrier to incorporate these terms and conditions by reference into a short-form bill of lading so as to give constructive notice to all shippers, consignees, and other parties in interest. Section 814, on the other hand, requires the filing only of agreements made between and among associations, groups, or conferences of carriers or other persons subject to the Shipping Act. Section 814 does not concern the filing of terms and conditions of contracts for carriage made between carriers and their customers. Thus, *Allstate* was based on a decision interpreting section 814, which is not applicable to questions concerning the proper interpretation of section 844.

Moreover, *Puerto Rico Marine Mgmt. v. Ken Penn Amusement*, 574 F. Supp. 563 (W.D.Pa. 1983), the other decision plaintiff relies on, is based on decision which either misinterpreted section 844 or simply did not interpret section 844 at all. *Ken Penn* involved a consignee's counterclaim against a carrier—the same carrier involved in this case—for damage to goods occurring while they were in the custody of the carrier. The carrier asserted that the counterclaim was barred by the one-year limitations provision

---

[12]The court in *Marvirazon* stated that a stevedore's tariff that is on file does not give a vessel owner constructive notice of a limitations provision contained therein because such provision is not required to be included in the tariff. 674 F.2d at 366, n.2.

Although the court indicated that the tariff in question had been filed with the Federal Trade Commission, we believe that the tariff had been filed with the Federal Maritime Commission pursuant to 46 U.S.C. § 814.

contained in its long-form bill of lading[13] on file with the FMC and incorporated by reference in the short-form bill of lading covering that shipment. The district court disagreed, holding that the consignee was not bound by this provision absent actual notice. 574 F. Supp. at 567. The court reasoned that a long-form bill of lading which is incorporated by reference gives consignees constructive notice only as to "rates, fares, and charges." *Id.*

The *Ken Penn* decision followed an earlier decision, *City of Nome v. Alaska Steamship Company*, 321 F. Supp. 1063 (D. Alaska 1971), which held a one-year limitations provision not binding against a consignee under circumstances similar to those in *Ken Penn*. Yet, as was the Allstate decision, *City of Nome* was based on inapposite judicial authority. *City of Nome* relied on *Pacific Steamship Co. v. Cackette*, 8 F.2d 259 (9th Cir.), *cert denied*, 269 U.S. 586 (1925), and *Port of Tacoma v. S.S. Duval*, 364 F.2d 615 (9th Cir. 1966). The *Pacific Steamship* decision is too old to be relevant in interpreting the effect of filing terms and conditions in a long-form bill of lading pursuant to 46 U.S.C. § 844 because the requirement of such filings was not added to the Intercoastal Shipping Act until 1958. Moreover, *Port of Tacoma* interpreted the effect of a terminal operator's agreement filed with the FMC pursuant to 46 U.S.C. § 814, not a carrier's long-form bill of lading filed pursuant to 46 U.S.C. § 844. Thus, *Port of Tacoma* was not applicable to the question presented in *City of Nome, Ken Penn*, and in this case.

III. Conclusion

In summary, we find inapplicable the authority relied on by plaintiff to support the contention that its claim is not barred by the one-year limitations provisions included in defendant's long-form bill of lading. We conclude that a long-form bill of lading filed with the FMC pursuant to 46 U.S.C. § 844 gives constructive notice to a consignee of all its provisions which are properly incorporated by reference into the short-form bill of lading covering the consignee's shipment of goods. In this case, because plaintiff assumed the same legal position as that of its insured, the consignee, we hold that plaintiff had constructive notice of the

---

[13] The long-form bill of lading referred to in *Ken Penn* is presumably the same long-form bill of lading at issue in this case.

one-year limitations provision contained in defendant's long-form bill of lading. Because plaintiff had such notice, its claim in this case was poperly time-barred because it did not file suit within one year of the date on which the cause of action arose. Accordingly, the judgment of the district court will be affirmed.

46 U.S.C. § 190
Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses or such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105 ° 1, 27 Stat. 445.

46 U.S.C. § 1311
Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.

46 U.S.C. § 1312
Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the

United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that is shall have effect subject to the provisions of this chapter.

Apr. 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc.No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

Supreme Court, U.S.
FILED
DEC 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-928

In the Supreme Court of the United States

OCTOBER TERM, 1985

INSURANCE COMPANY OF NORTH AMERICA, ET AL.,
PETITIONER,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. RAMON RIVERA-MORALEZ*
JIMENEZ, GRAFFAM & LAUSELL
G.P.O. Box 6104
San Juan, Puerto Rico 00936
Tel: (809) 767-1030
Attorneys for Respondent Puerto Rico Marine Management, Inc.

* *Attorney of Record*

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

BEST AVAILABLE COPY

10 pp

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of the Case	1
Reasons for Denying the Writ	2
Argument	2
I. There is no Conflict of Authority Among the Courts of Appeal on the Question Presented	2
II. The Granting of the Writ Would Not Materially Benefit the Petitioner's Case or Advance This Litigation	6
Conclusion	7

TABLE OF AUTHORITIES

Cases

Allstate Insurance Company v. *International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983)	4
Cities Service Oil Co. v. *Puerto Rico Lighterage Co.*, 305 F.2d 170, 171 (1st Cir. 1962)	6
Insurance Company of North America v. *Puerto Rico Marine Management, Inc.*, 768 F.2d 470 (1st Cir. 1985)	2, 3

Statutes

46 U.S.C. §§1300-1315	2
§1300	2
§1303(3)	2
§1307	4, 5
§1311	4
§1312	2, 3

In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-928

INSURANCE COMPANY OF NORTH AMERICA, ET AL.,
PETITIONER,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

The Petition for Writ of Certiorari under consideration concerns an action in subrogation brought by a marine cargo insurer. The case arises as a result of a loss of cargo sustained by the petitioner-plaintiff's insured. After payment to its insured, the present suit was brought against the carrier.[1]

[1] The carrier is the respondent-defendant. Pursuant to Supreme Court Rule 28.1 it is stated that respondent, Puerto Rico Marine Management, Inc., is a wholly owned subsidiary of the Puerto Rico Maritime Shipping Authority, a public corporation and instrumentality of the government of the Commonwealth of Puerto Rico. *See* 23 Laws of Puerto Rico Annotated Secs. 3051-3073.

The bill of lading under which the cargo in question was carried expressly incorporated the terms of the Carriage of Goods by Sea Act, 46 U.S.C. Secs. 1300-1315, and incorporated the terms of a long form bill of lading on file with the Federal Maritime Commission. Both the Carriage of Goods by Sea Act (in its section 3(3), 46 U.S.C. Sec. 1303(3)) and the long form bill of lading (in its items numbers 1 and 22, *see* 768 F.2d at 470) expressly provide for a one year time-for-suit provision. Because the alleged misdelivery in this case occurred on January 4, 1982, and suit was not filed until December 1, 1983, the defendant carrier moved to have the action dismissed by the District Court on the grounds that the same was time-barred.

Both the District Court, at 599 F. Supp. 199 (D.P.R. 1984), and the Court of Appeals for the First Circuit, at 768 F.2d 470 (1st Cir. 1985), held that the insurer's claim was time-barred.

Reasons for Denying the Writ

There are two reasons why the writ should be denied.

First, there is *no* disagreement among the Circuit Courts with respect to the question of whether it is the Harter Act or the Carriage of Goods by Sea Act which governs a cargo claim for loss of cargo occurring after a completed voyage.

Second, irrespective of whether or not it is the Carriage of Goods by Sea Act or the Harter Act which applies to the facts of this case, a decision on this point does not materially affect the outcome of this case.

Argument

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

As was discussed by the Circuit Court below, 768 F.2d at 473, the Carriage of Goods by Sea Act (hereinafter "COGSA") applies of its own force only "[t]o or from parts of the United States in foreign trade. . . ." 46 U.S.C. Secs. 1300, 1312. It

does not apply of its own force to cargo carried from Elizabeth, New Jersey to San Juan, Puerto Rico as these are not properly ports in foreign commerce.

COGSA does provide, however, that it can be made applicable to ocean carriage between ports of the United States whenever a bill of lading, or other similar document of title, expressly states that the terms of the Act apply to such transportation. In this respect 46 U.S.C. Sec. 1312 provides:

> This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, *that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter:* Provided further, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter. (Emphasis supplied).

There is no dispute that the bills of lading here in question expressly incorporated the terms of COGSA and made them fully applicable. *See* 768 F.2d at 475, fn. 7.

In requesting this Court to issue a Writ of Certiorari the petitioner contends that after cargo has been discharged from a vessel the terms and conditions of COGSA—and consequently the COGSA time-for-suit provision—cease to apply. For this the petitioner relies on 46 U.S.C. Sec. 1311 which provides:

> Nothing in this chapter shall be construed as superseding any part of sections 190-196 of this title [Harter Act], or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Insofar as the alleged loss of cargo in the present case occurred after the same was discharged from the ship, the petitioner argues that, on the basis of section 1311 quoted above, the Harter Act, 46 U.S.C. Secs. 190-196, and not COGSA apply in determining whether the claim was time-barred.

The petitioner further argues that there is Circuit Court authority which sustains the proposition that where the loss occurs prior to or after discharge of the cargo from the vessel, COGSA does not apply and it is the Harter Act which controls for statute of limitations purposes. This case is *Allstate Insurance Company* v. *International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983), and the petitioner contends its holding is in direct conflict with the Court of Appeal's decision below in the present matter.

There are two reasons why petitioner's argument in favor of the granting of the writ of certiorari is without merit. First, although COGSA does *not* apply in the first instance to the period after the discharge of cargo from a vessel, it *can* apply after discharge if the bill of lading specifically extends the period of coverage. In this respect 46 U.S.C. Sec. 1307 provides that:

> Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and *subsequent to the discharge from the ship* on which the goods are carried by sea. (Emphasis is supplied).

Therefore, the law in this respect is very clear that COGSA *can* be incorporated to apply to shipments not in foreign commerce, and that it *can* be incorporated into a bill of lading so as to apply to the period prior to loading and after discharge. This is all logically thought out and it is a specific part of the statute.

Second, the Eleventh Circuit decision in the *Allstate Insurance* case is easily distinguishable and presents no real conflict with the Court of Appeals decision in this case. While COGSA can apply to the period prior to and after discharge, *see* discussion above, the bill of lading must specifically say so. *See* 46 U.S.C. Sec. 1307, quoted above.

There is no indication whatsoever that the bill of lading the Eleventh Circuit had before it in the *Allstate Insurance* case had any language extending coverage of the Act to the period prior to loading and after discharge of cargo. In direct contrast to that situation, the bill of lading here in issue *expressly* and *unequivocally* extended its scope to the time period after discharge. It is, therefore, entirely logical that two different sets of facts will produce two different results. Properly read from this perspective, each Circuit Court decision is consistent with each other. In the Eleventh Circuit case COGSA could not apply to a loss to cargo occurring prior to loading because the bill of lading did not specifically extend the Act to this period of time. In the First Circuit case at issue here COGSA can and does apply because the bill of lading has specifically incorporated the terms of the Act to the period after discharge.

The above is an elementary principle of cargo claims law and this case presents no strong reason why any aspect of this state of law should be the subject of review by this Court.

II. The Granting of the Writ Would Not Materially Benefit the Petitioner's Case or Advance the Litigation

The lower courts in this case dismissed the petitioner's complaint because it was time-barred. As stated earlier, the long and short form bills of lading here in question incorporated COGSA, and, COGSA provides for a one year time-for-suit provision.

In the lower courts the petitioner argued that its claim was not governed by a one year limitations but by the concept of laches and, therefore, suit must have been filed within a "reasonable" period of time. The petitioner's reasoning was that, insofar as COGSA does not apply to the period after discharge, it is the Harter Act which controls and the Harter Act contains no statute of limitations.

Even supposing, however, that there were some way that petitioner's COGSA-or-Harter Act argument could succeed, this could not materially assist petitioner's time-bar argument and this fact strongly counsels against granting the writ of certiorari.

Assuming, *arguendo*, that a cargo claim involving a loss of cargo occurring after discharge could in no way be governed by COGSA, it is difficult to perceive that petitioner could nevertheless overcome a limitations defense. It is clear that in a non-COGSA (Harter Act) situation laches would control. Under the doctrine of laches, however, courts look to time periods contained in statutes (federal or local) which deal with analogous situations. *See e.g. Cities Service Oil Co.* v. *Puerto Rico Lighterage Co.*, 305 F.2d 170, 171 (1st Cir. 1962). In the present case the analogous statute would be COGSA (which provides for one year) and the Puerto Rico Commercial Code, 10 Laws of Puerto Rico Annotated at Section 1910 (also providing a one year time limitation).

Since the plaintiff waited nearly two years to file its action against the carrier, a decision by this Honorable Court to the effect that the Harter Act, and not COGSA controlled, would still not assist the petitioner-plaintiff in overcoming a limitations defense and, thus, this Court's accepting review of the issue presented would not materially advance or benefit the plaintiff-petitioner's case in this litigation.

Conclusion

Congress has expressly and unequivocally allowed ocean carriers to extend and incorporate the provisions of COGSA to periods of time before loading and after discharge. No acceptable reason can be advanced in this case to warrant this Court to review this provision of the maritime commercial statute known as COGSA. There is neither a conflict or a tension between the Harter Act and COGSA, nor between the case law mentioned by the petitioner. When a carrier has specifically incorporated COGSA to apply before loading and after discharge it will apply. When the carrier has not extended COGSA in this manner, it will not apply. It is as simple as that.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

J. Ramon Rivera-Moralez*
Jimenez, Graffam & Lausell
G.P.O. Box 6104
San Juan, Puerto Rico 00936
Tel: (809) 767-1030
Attorneys for Respondent
Puerto Rico Marine
Management, Inc.

* *Attorney of Record* admitted August 16, 1985.